

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION I

CA07-725

BRANDY PARKER-GEUSZ
APPELLANT

FEBRUARY 6, 2008

V.

WAL-MART ASSOCIATES, INC. and
CLAIMS MANAGEMENT INSURANCE
APPELLEES

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F507283]

AFFIRMED

This appeal follows the April 13, 2007 decision of the Workers' Compensation Commission (Commission) affirming and adopting the August 24, 2006 opinion of the Administrative Law Judge (ALJ), finding that appellant Brandy Parker Geusz failed to prove by a preponderance of the evidence that she suffered compensable injuries to her back and left shoulder on July 3, 2005. On appeal, appellant contends that the Commission's decision is not supported by the greater weight of the substantial evidence. Viewing the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision, we hold that the decision is supported by substantial evidence. Accordingly, we affirm.

Appellant was hired by appellee Wal-Mart Associates, Inc. in April 2005. On July 3, 2005, she was loading food into the top shelf of a cooler in the back of the produce room. She slipped off the six-to-eight-foot ladder and fell, hitting her back and shoulder on the shelving for the produce before striking the floor on her buttocks. The fall was not witnessed, and appellant lay on the floor a few minutes before getting up and finishing her shift. She did not report her accident or any injury at that time, thinking that she would be fine. After her shift, appellant went home and took a shower, at which time she had “real bad pain” in her shoulder and back. She had her cousin take her to the emergency room at Northwest Medical Center later that evening. She claims she was experiencing severe pain in her mid-to-low back, in her mid back around to her side, and also in her left shoulder. Appellant stated that she advised the emergency-room personnel of *all* of these complaints and further reported that they were the result of an employment-related fall that had occurred that same day. While at the emergency room, she was tested for kidney-stone disease because of her lower and mid-back pain, and a CAT scan was performed. She was given muscle relaxers and Naproxin for her pain. Appellant was confined to bed for two weeks and taken off work by the emergency-room physician.

Appellant had a follow-up visit with Dr. Elizabeth Cuevas on July 11, 2005, which included an x-ray and another prescription for medications. After returning to light-duty work, appellant was then seen at the Arkansas Occupational Health Clinic at Lowell Medical Center, at the request of appellee, by physician’s assistant Max Beasley. She next presented there on July 22, 2005, and again on July 25, 2005, at which time she was examined by Dr.

Konstantin Berestnev, a general practitioner and appellee's company physician. Additional x-rays were taken, and she was put on a lifting restriction of no more than five-to-ten pounds. After the third visit, her doctor ordered a diagnostic MRI, but she was denied further treatment under her workers-compensation claim. She did not proceed with the MRI because she personally could not afford to pay for the test at that time.

On August 1, 2005, appellant presented to Dr. Cyril Raben, an orthopaedic surgeon with Northwest Arkansas Spine and Orthopaedics, who had the MRI taken and gave her muscle relaxers for back spasms and additional pain medication for her shoulder. The MRI results of the cervical spine and left shoulder were normal. Dr. Raben diagnosed appellant with having derangement and stenosis at L3/4 and L4/5, recommended physical therapy,¹ and referred her to Dr. Jacob Kaler, an orthopaedic surgeon and shoulder specialist with Ozark Orthopaedic and Sports Medicine Clinic, Ltd. Dr. Kaler observed bruising and a left-shoulder contusion and put appellant on restriction of lifting no more than ten-to-twenty pounds.

Appellant quit work entirely in August 2005 because of her continuing pain. She presented again to Drs. Raben and Kaler; she also saw Dr. Robert Thompson, an orthopaedic surgeon, who diagnosed a thoracolumbar strain/sprain in October 2005 and put her on restriction of lifting no more than five pounds. At that time, she returned to work for appellee in another store in Jane, Missouri, as a cashier, for approximately one month. She

¹Appellant attended physical therapy for two weeks until she could no longer afford to pay for it through her husband's insurance.

was subsequently fired, presumably because she was unable to lift more than ten-to-fifteen pounds and was unable to be on her feet for long periods of time. As of June 2006, appellant was still complaining of problems with her shoulder and back spasms occurring on a daily basis.

A hearing was held before the ALJ on June 12, 2006, and on August 24, 2006, the ALJ issued his opinion finding that appellant failed to prove by a preponderance of the evidence that she suffered compensable injuries to her back and left shoulder. Appellant filed a timely notice of appeal of the opinion to the Commission on September 22, 2006, and on April 13, 2007, the Commission issued its opinion affirming and adopting the ALJ's opinion. Appellant filed a timely notice of appeal of the Commission's opinion on May 16, 2007. This appeal followed.

Typically, on appeal to this court, we review only the decision of the Commission, not that of the ALJ. *Daniels v. Affiliated Foods S. W.*, 70 Ark. App. 319, 17 S.W.3d 817 (2000). In this case, the Commission affirmed and adopted the ALJ's opinion as its own, which it is permitted to do under Arkansas law. *See Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003). Moreover, in so doing, the Commission made the ALJ's findings and conclusions the findings and conclusions of the Commission. *See Branum supra*. Therefore, for purposes of our review, we consider both the ALJ's order and the Commission's majority order.

In appeals involving claims for workers' compensation, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the

Commission's decision and affirms the decision if it is supported by substantial evidence. *See Kimbell v. Ass'n of Rehab Indus. & Bus. Companion Prop. & Cas.*, 366 Ark. 297, 235 S.W.3d 499 (2006). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether the appellate court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, the appellate court must affirm the decision. *Id.* Where the Commission denies a claim because of appellant's failure to meet his burden of proof, the substantial-evidence standard of review requires that we affirm if the Commission's decision displays a substantial basis for the denial of relief. *Id.* We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, 218 S.W.3d 351 (2005).

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Patterson v. Ark. Dep't of Health*, 343 Ark. 255, 33 S.W.3d 151 (2000). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Id.* The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.* The Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Poulán Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002).

Thus, we are foreclosed from determining the credibility and weight to be accorded to each witness's testimony. *Arbaugh v. AG Processing, Inc.*, 360 Ark. 491, 202 S.W.3d. 519 (2005). As our law currently stands, the Commission hears workers' compensation claims de novo on the basis before the ALJ pursuant to Ark. Code Ann. § 11-9-704(c)(2), and this court has stated that we defer to the Commission's authority to disregard the testimony of any witness, even a claimant, as not credible. *See Bray v. Int'l Wire Group*, 95 Ark. App. 206, 235 S.W.3d 548 (2006).

Appellant contends that the Commission clearly disregarded her testimony and the information provided in the medical records and ignored the opinions of her treating physicians in finding that she had not proven compensability. The sole issue on appeal is whether appellant proved that she sustained compensable injuries to her back and left shoulder in a specific employment-related accident on July 3, 2005. Appellant has the burden to prove all of the statutory requirements necessary to establish the alleged "compensable injuries." Arkansas Code Annotated section 11-9-102(4)(D) provides that appellant must prove by medical evidence the actual existence of the physical injuries or conditions alleged to be compensable. She must also prove that the actual existence of these physical injuries or conditions is supported by "objective findings," defined as the independent observation of findings that are beyond appellant's voluntary control.

I. Objective Medical Findings

The Commission acknowledged that the evidence presented did establish the existence of some type of physical injury or condition involving appellant's back and left shoulder.

However, the existence of these diagnosed injuries must be based upon or supported by “objective findings,” as that term is defined in Ark. Code Ann. § 11-9-102(16)(A)(i). The Commission found that in the present case, there were no objective findings to support the existence of any physical injury to her left shoulder. Appellant underwent numerous x-rays of her left shoulder, all of which were interpreted as normal. She also had an MRI of the shoulder joint, which revealed no abnormalities.

The only notations in the medical records before us that are close to objective medical findings related to appellant’s shoulder are (1) a note in Dr. Berestnev’s letter dated July 22, 2005, that reads “[l]eft shoulder contusion² and lumbar strain healing, but pain persists,” and (2) a note in Dr. Kaler’s August 31, 2005 report, in which he notes “old ecchymosis or bruising at her junction proximal mid third of the lateral arm.” However, the second note from Dr. Kaler appears to involve an area of appellant’s left arm well below the shoulder area and is not necessarily indicative of an injury to the shoulder itself. That said, appellant argues that the bruising noted by Drs. Berestnev and Kaler would lead reasonable minds to conclude that such contusions were consistent with a fall on her side and shoulder, and accordingly, the Commission erred in determining that no objective findings existed with respect to her shoulder.

²Appellant cites *Meister v. Safety Kleen*, 339 Ark. 91, 3 S.W.3d 320 (1999), as defining a contusion as an injury in which the skin is not broken but underlying blood vessels are disrupted causing hematoma under the skin.

Based upon our review of the medical records included in the Addendum, none of the previous physicians that had examined appellant noted the bruising mentioned by Dr. Berestnev. However, appellant points out that it was at the time that Dr. Berestnev noticed the shoulder bruise that he ordered a diagnostic MRI, at which point appellee refused to cover any additional treatment. She maintains that appellee did not want her to have the benefit of testing that would have clearly defined her injury; however, it should also be noted that when the MRI was finally performed the results related to her shoulder were normal.

Appellant also refers to the Workers' Compensation Request for Medical Care form dated July 15, 2005, in which appellant's manager, Pat Greenlee, reported bruising. That bruising notation relates only generally to the "left side of the body" as opposed to specifically referencing her left shoulder. Under the diagnosis section the form lists, "fall injuries: [left] shoulder thoracic spine, [left] rib pain, [left lower quadrant] abd. pain." It is difficult to determine whether this information is sufficiently "objective" because the notations in this report apparently came from information appellant personally relayed to Ms. Greenlee for the express purpose of completing the report.

Regarding appellant's complaints of back pain, objective medical findings were noted, particularly in the area of the lumbar spine. They consist of radiographic findings noted on the x-rays, as well as the MRI study. However, the Commission found that these abnormalities were essentially in the form of degenerative changes such as intervertebral-disc dessication with resulting disc-space narrowing and mild-to-minimal diffuse bulging of the annulus of the L3-4 and L4-5 intervertebral disc. The ALJ stated in his opinion, which was

later affirmed and adopted by the Commission, that such degenerative changes would not be unusual for an individual of appellant's age and weight³ and would not be particularly indicative of any recent specific trauma.

Appellant counters that, if those findings were degenerative in nature, one would expect to see degeneration of all the levels of the spine, rather than just two. Additionally, she asserts that the standard does not require that the MRI directly relate to her compensable injury. *See Wal-Mart Stores, Inc. v. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999) (finding that while objective medical evidence is necessary to show compensability, it is not necessary to establish a causal connection).

The Commission found that based upon the reports of appellant's repeated physical examinations, no objective findings generally attributable to a recent acute traumatic event, such as bruising, swelling, inflammation, or muscle spasm, were noted. Appellant, however, disagrees and contends that bruising, swelling, inflammation, and muscle spasms were documented, and points out that the hospital records from her July 4, 2005 emergency-room visit indicate that she was prescribed Flexeril, a muscle relaxant used for muscle spasms or acute injury. She cites *Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000), in which our supreme court held that muscle spasms could constitute objective-medical findings, especially when detected by a physician, physical therapist, etc., other than the claimant. *See also Fred's, Inc. v. Jefferson*, 361 Ark. 258, 206 S.W.3d 238 (2005) (finding

³ Appellant was twenty-seven years old at the time of the accident and the various medical records list her height as 5' 10" and her weight in the range of 200 - 220 pounds.

that, despite the absence of a reason for a prescription in the medical records, the prescription for a muscle relaxant after an injury constituted objective findings).

II. Other Compensability Requirements

While the Commission found that appellant satisfied the statutory requirement of Ark. Code Ann. § 11-9-102(4)(D) in regard to her back injury, she was also required to prove that the medically established and objectively documented physical injury to her back satisfied the following requirements of Ark. Code Ann. § 11-9-102(4)(A)(i):

- (1) that the injury arose out of and occurred in the course of the employment;
- (2) that the injury was caused by a specific incident;
- (3) that the injury is identifiable by time and place of occurrence;
- (4) that the injury caused internal physical harm to her body;
- (5) that the injury required medical services or resulted in disability.

The only direct evidence presented by appellant to prove the first three of these requirements was her own testimony. Although the testimony of a party is never considered uncontradicted, *see Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998), this does not mean that it can be arbitrarily disregarded. *See Stone v. Dollar Gen. Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2005). If such testimony is credible, it may be sufficient, in and of itself, to prove any fact it is legally competent to address. *See Continental Express, supra*. However, the Commission found that appellant's testimony was not sufficiently credible to prove those three statutory requirements of Ark. Code Ann. § 11-9-102(4)(A)(i), which prevented the Commission from finding that the alleged back injury was "compensable."

It is undisputed that appellant's fall on July 3, 2005, was not witnessed and that she continued to work and finish her shift. She did not immediately report her accident or injury; however, she did go to the emergency room later that night and contends that she was experiencing severe pain in her mid-to-low back, pain in her mid back and around into her side, and pain involving her left shoulder. She testified that her cousin reported the incident and appellant's restrictions to one of appellee's night-shift managers that same evening.

The emergency room records do not contain any history of an employment-related accident or fall as the cause of the complaints listed. One of the histories taken states, "Chief complaint left side abdominal pain, nausea, no vomiting, started today (approximately) 1000." Another history lists appellant's complaints as, "Sharp cramping pain associated with loss of appetite and nausea" and further notes, "Has had some pain back *off and on for approximately one month.*" (Emphasis added.) Various physical examinations were also performed during the emergency-room visit and the results are noted in the emergency-room records.

A triage exam was performed by the emergency-room nurse and then a physical examination was performed by the emergency-room physician. Neither of the results note evidence of acute trauma, such as bruising, abrasions, redness, swelling, related to any portion of appellant's body, particularly her back, buttocks, and left shoulder. The Commission found it difficult to conceive that a person of appellant's weight, between 200 and 220 pounds, could have fallen from the upper part of a six-to-eight-foot ladder, hit the

concrete floor on her buttocks, and slammed her back on metal shelving without experiencing any bruises or abrasions to those areas.

The pain diagram completed by appellant at that time indicated mild tenderness in the lower-left quadrant of her abdomen and around the left side of her back, around the area of her kidney. Extensive testing, including CT scans, were performed on appellant's abdomen and pelvis because of her prior history of cervical cancer. All of these tests were essentially negative. No specific tests were performed on appellant's left shoulder or mid-to-lower back at the emergency room. The Commission concluded that the obvious reason for the failure to initiate any testing on appellant's left shoulder or spine would be because appellant failed to voice any complaints related to potential injuries to these areas. This finding appears to have played a significant role in appellant's credibility being called into question.

The emergency-room records indicate that appellant was advised to return for follow up at the emergency room or with her family physician in one-to-two days, if she were not completely better; however, she sought no further medical treatment until a week later on July 11, 2005. At that time, she was seen by Dr. Cuevas, at the medical group where she apparently goes for primary-care treatment. The office notation of that date indicates that appellant was being seen in follow up from the emergency room for left-flank pain that appeared on July 4, 2005, and indicated that she was seeking a refill of her pain medication because she was still in pain. This report contains the first indication of an employment-related accident as the cause of appellant's complaints, specifically, "Fell off a ladder striking left posterior rib area. Fell off a ladder at work Sunday a 6-8-ladder-hit a metal

shelving with her back left rib area.” A diagnosis was made at that time of a “probable torn rib cartilage,” but there is no evidence of complaints involving her left shoulder or her actual back or spine or any indication that her physical examination revealed any objective findings of recent or acute trauma such as bruising, swelling, abrasions, redness, or muscle spasms. It was noted that appellant had a full range of motion of her back at that visit.

Upon appellee’s request, appellant was next seen at the Occupational Health Clinic on July 15, 2005, and Mr. Beasley’s clinic note is the first record of any complaints involving appellant’s left shoulder. However, it contains a somewhat different description of appellant’s alleged employment-related accident:

Patient states she was in a cooler on a 6-foot ladder and lost her footing and fell to the floor on her left side. Complains of left shoulder and rib pain. Treated at Northwest of Benton County emergency room and Dr. Elizabeth Cuevas in Gentry.”

(Emphasis added.) The note also indicates, “She says she came down on her left shoulder and has left lower quadrant pain since the incident.” (Emphasis added.) However, Mr. Beasley failed to mention findings of any recent or acute trauma to appellant’s shoulder or back aside from her complaints of tenderness. His physical examination of appellant revealed that appellant exhibited a normal range of motion of her left shoulder. X-rays of appellant’s left shoulder were interpreted as normal. There is no reference by appellant to any symptoms that would be directly attributable to an injury to her actual back or lumbar spine.

The first mention of complaints directly involving appellant’s actual back or lumbar spine is not found until appellant’s return visit to the Occupational Health Clinic on July 22,

2005. At that time, she was seen by Dr. Berestnev who noted that appellant's symptoms primarily involved her "back." However, he did not note any objective findings indicative of recent trauma or injury. On July 25, 2005, appellant returned to Dr. Berestnev, at which time he noted that appellant's symptoms were then focused in the area of her left shoulder.

On August 1, 2005, appellant was seen by Dr. Raben, upon referral from her attorney, who indicated that her complaints involved her back, neck, and entire left arm. In his clinic note, Dr. Raben recorded yet another description of appellant's fall:

She missed her footing and fell down the entire length of the ladder. She fell across the bottom stile (step) of the ladder with her buttocks hitting the ground and her back landing across the bottom stile (step).

On this visit, there were still no objective findings noted on Dr. Raben's physical-examination report to support appellant's subjective complaints. An MRI was subsequently performed, at Dr. Raben's request, on appellant's cervical and lumbar spines. However, no abnormalities were revealed related to the cervical spine and the results showed only essentially degenerative changes involving the lumbar spine. An MRI of appellant's left shoulder, also performed at Dr. Raben's request, was interpreted as normal.

On October 31, 2005, appellant was seen, at Dr. Raben's request, by Dr. Kaler, who noted that appellant gave him a history of falling off an eight-foot ladder, but did not record a detailed description of the actual fall. The physical examination report again failed to reveal any objective findings to support appellant's left shoulder complaints or left-upper extremity complaints, noting only "old ecchymosis or bruising at her junction proximal mid

third of the lateral arm.” As previously mentioned, this note appears to involve an area of appellant’s left arm well below the shoulder area.

Finally, when Dr. Raben advised appellant that he had nothing further to offer her and that he was going to return her to work, she consulted Dr. Thompson, another orthopaedic surgeon, who, in his report of October 28, 2005, recorded a history of appellant’s complaints as follows, “Fell of [sic] a ladder and landed on her bottom on July 3, 2005. Since that time she has had pain in the thoracolumbar region to her low back without leg pain.” Dr. Thompson recorded that appellant reported her pain to be ten out of ten in intensity; however, the results of his physical examination continued to reveal no objective findings that would support appellant’s extensive complaints. Dr. Thompson released appellant to return to work at light duty with no lifting or carrying greater than five pounds, and he has not seen her for any follow-up care.

While objective medical findings exist related to problems with appellant’s back, under our standard of review, there is evidence to support the Commission’s decision to deny compensability. Aside from appellant’s testimony, there is nothing that supports the compensability of her back pain. Appellant contends that she was a credible witness and that her testimony was sufficient to satisfy the requirements of Ark. Code Ann. § 11-9-102(4)(A)(i); however, that is simply not what the ALJ and Commission believed. Appellant gave conflicting descriptions of both the nature and the cause of her complaints. Her testimony about the accident and the immediate onset of *all* of her symptoms, including her left shoulder and back pain, was inconsistent with the medical evidence presented.

The medical records before us indicate that appellant's symptoms and complaints have shifted from her lower-left quadrant and kidney area to her lower back, her neck, her left shoulder, her left arm, etc., but the main concern is that the medical records fail to show any objective evidence of abnormalities sufficient to explain symptoms of the magnitude and duration described by appellant. The Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Marshall, supra*.

The ALJ and Commission appear to have considered the inconsistencies and contradictions between appellant's testimony and the medical records in light of her relatively brief period of employment with the appellee, along with the fact that the accident was unwitnessed. They focused on the lack of corroboration and absence of any outside factors that would reasonably enhance appellant's credibility in determining that her testimony was to be given no weight and credit. To reiterate the previously set-forth standard, questions concerning the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. *Patterson supra*. It is within the Commission's province to reconcile conflicting evidence and to determine the true facts when there are contradictions in the evidence. *Id; see also Rodriguez v. M. McDaniel Co., Inc.*, 98 Ark. App. 138, __ S.W.3d __ (2007). Thus, we are foreclosed from determining the credibility and weight to be accorded each witness's testimony. *Arbaugh supra*.

We are not convinced based upon the evidence before us, especially the lack of objective-medical findings that meet the requirements of Ark. Code Ann. § 9-11-102(4)(A)(i), that fair-minded persons with the same facts before them could not have reached the same conclusions arrived at by the Commission. *See Dorris supra*. Accordingly, we affirm.

Affirmed.

PITTMAN , C.J., agrees.

BAKER, J., concurs.